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Guidelines for the TCDA Prosecution of Cases

Introduction

At TCDA, we treat every case differently. We know that every victim is different, every crime is different, and every accused is different than the next. Our overarching goal is to use evidenced based research to create guidelines that are geared towards crime prevention and community safety. Sometimes this will mean lengthy prison sentences, and sometimes this will mean community-based diversion or a dismissal of charges. Because there is no one-size fits all, we are asking our staff to incorporate the below principles into their work. Attached at the end of these policies are flowcharts which are intended to be a guide to help prosecutors think through how to use their prosecutorial discretion on each case.

The overarching question to be asked in every case: what can be done to ensure that the crime is not committed again and that the victim feels safe?

Bail: Those who have committed heinous crimes and are a danger to the community should remain in custody pending trial. But we must work to ensure that it is not just the wealthy who are given an opportunity to be released when they are not a danger to the community.

While we cannot set bail ourselves, we will follow our bail statute and we will be using this analysis to recommend bail to the Judges who will make the final determination:

- We will not consider a person who is an attendance risk, meaning they have missed court in the past but have not attempted to evade the police, a flight risk.
- For anyone charged with a State Jail Felony, there will be a presumption of release with no conditions if it is determined that the person poses no threat to community safety or risk of flight.
- For anyone charged with a higher-level felony, there will be a presumption of release with the least restrictive condition necessary to ensure that the person is not a risk to the community or risk of flight.
- Anyone who poses a future risk of harm to our community or a risk of a flight that cannot be addressed by conditions other than pre-trial incarceration should remain in custody.

Discovery/Brady: We should be as open and forthright with discovery and *Brady* as possible. If we are in possession of offense reports or other materials pre-indictment, and there is not a legitimate law enforcement reason not to give it to defense, we should make it available regardless of whether there has been a defense request. Legitimate reasons for withholding information pre-indictment may include an investigation for another crime that is mentioned in the offense report. During the course of the case, there should rarely be material in our possession that is not handed over, but if for some reason we have evidence that falls outside of Art. 39.14, and we believe it could be exculpatory, we should always err on the side of caution and turn it over (“if you have to ask if it’s *Brady*, turn it over”). We should always notify the defense when we specifically find *Brady*, especially if it is a voluminous case with thousands of pages of documents such as CPS records.

Grand Jury: We will present cases to the grand jury when there is either a compelling policy reason to let the community decide if the case should move forward or if we are confident that we can prove the case beyond a reasonable doubt. If a necessary witness is not cooperative and we cannot prove the case at trial without them, we will not present the case. If deficiencies cannot be remedied within 90 days, consent to release of the defendant and/or dismiss the case. See TX CCP Art. 17.151 (1).

Readiness: If efforts to contact necessary witnesses have failed, or the witness refuses to cooperate and charges cannot be proven without the witness, defense counsel must be notified after 30 days post-indictment. If after six months, and reasonable efforts to contact necessary witnesses have failed and/or efforts to gain cooperation have failed, the case should be dismissed as “witness not available.” Due to the pandemic, for open cases prosecutors should consider the last six months from April 15, 2021, moving forward it is six months from arrest. There may be exceptions- please conference with your director if you believe that circumstances will change and the case should not be dismissed.

Diversion: We have greatly expanded our pre-trial diversion program so that more people will be eligible, and have structured the program so that our prosecutors can seek to find eligible people instead of waiting on defense counsel to ask. We will also be asking stakeholders to work with us to expand services that we can offer. At this moment, a team of experienced prosecutors is reviewing cases to determine if the person is eligible for diversion. Attached is a “FAQ” for diversion.

Victim Input: When the victim is a family member or known to the accused, consider their thoughts on sentencing and what is likely cause the least amount of harm or trauma. We do not know better than the person who has been hurt by a loved one what is best for them. We must listen to victims and hear what they need to help them on the path towards healing. We have the ability to be creative and responsive to their needs, if we listen and think outside the box. Child victims should not bear the responsibility of making a decision about a loved one, however, ADAs should make every effort to determine which outcome is the least traumatizing and will keep the community safe.

When the victim is a stranger to the defendant, while it is important that we listen to victims’ requests with regard to sentencing and understand their reasoning, it is also important that we set realistic expectations. We should also consider and discuss with victims steps that can be taken to ensure victims feel safe, or could be made whole again in or out of the criminal justice system

(such as offender-victim mediation, restorative justice referrals, restitution, testifying at sentencing, etc.).

Ex Parte: No attorney, team leader, or director shall have an ex parte discussion with a judge about a case. This applies to scheduling, bond decisions, and any other issue about a case. **See** Canon 3 (B)(8) of the Texas Code of Judicial Ethics. **See also** ABA Model Code of Judicial Conduct, Rule 2.9: Ex Parte Communications. We recognize that this may not always be possible, and please let us know if you'd like a Director to speak directly to a judge about this.

Sentencing: Over the past forty years, criminal sentencing has become increasingly disconnected from promoting public safety. The result is a massive system of incarceration which research reveals serves little measurable crime-reducing purpose and causes substantial harm to the individuals, family members, and communities it affects. The Travis County District Attorney's office must play a central role in reorienting criminal sentencing in ways that strengthen the social fabric of our community and advance public safety. This set of plea guidelines will help Assistant District Attorneys by providing direction for how to charge and resolve their cases.

To responsibly reduce over-incarceration, and the substantial negative effect it has on public safety, criminologists, researchers, and scholars have suggested a number of key sentencing reforms to address mass incarceration going forward. They include:

- Utilize minimum mandatory penalties, habitual offender sentencing enhancements, and other extreme mandatory punishments only when there is an articulable public safety reason to do so.¹
- Impose Jail or Prison sentences for drug and other victimless offenses only when there is a public safety reason to do so.²
- Utilize community supervision rather than incarceration whenever possible.³ The length of probation terms should be no longer than necessary to achieve the goal of probation, which is generally about two years.⁴
- Only punish violations of probation with incarceration when there is a direct connection to a legitimate community safety risk.⁵

¹ Marie Gottschalk, *Caught: The Prison State and the Lockdown of American Politics*, 266 (Princeton, NJ: Princeton University Press 2015); Natasha A. Frost, Todd R. Clear, and Carlos E. Monteiro, *Ending Mass Incarceration: Six Bold Reforms*, in Ernest Drucker, ed., *Decarcerating America: From Mass Punishment to Public Health* (New York: The New Press 2018) at 31-33; Michael Tonry, *Remodeling American Sentencing: A Blueprint for Moving Past Mass Incarceration*, 13 *Criminology and Public Policy* 504, 516-17 (2014).

² Clear and Austin (2009) at 317; Frost, et. al. (2018) at 29.

³ Gottschalk (2015) at 259.

⁴ Clear and Austin (2009) at 317, 321; James F. Austin, *Reducing America's Correctional Populations: A Strategic Plan*, 12 *JUSTICE RESEARCH AND POLICY* 1, 27 (2010).

⁵ Clear and Austin (2009) at 318; Frost, et. al (2018) at 34; Austin (2010) at 19-20

- Impose prison sentences that have an evidence-based connection to public safety and reducing recidivism.⁶
- Age should matter in criminal sentencing, and individuals under the age of 35 or 40 should never be imprisoned without parole considerations, regardless of the offense or conviction.⁷
- Listen to all victims, and ensure that any sentence does not cause more harm to the victim when the defendant is a loved one or family member.

These recommendations for safely reducing over-incarceration can help prosecutors in this office use our discretion to eliminate unnecessary imprisonment and devote more resources to cases that implicate the physical safety of people in our community. The most important shifts must occur during the pretrial process, where the vast majority of criminal cases in Travis County are resolved. To that end, we have developed the following plea recommendations to ensure that every prosecutor in this office has the necessary framework for charging and pleading cases in ways that strengthen the social fabric of our community and make our neighborhoods safer for everyone.

Attached are flowcharts that should serve as a guide for prosecutors working through cases.

⁶ Frost, et. al (2018) at 32 (“Sentences beyond ten years should be rare. Sentences of life should be eliminated. There should be no such thing as life without the possibility of parole.”); see also Clear and Austin (2009) at 319; Taylor (2017); Austin (2010) at 19.

⁷ Frost, et. al (2018) at 33; Tonry (2014) at 524.



TCDA PRETRIAL DIVERSION

What is our current pretrial diversion program?

Pretrial diversion includes our current specialty courts, TCDA supervised diversion, and probation supervised diversion. This policy provides for diversion opportunities with varying degrees of intensity with respect to programmatic requirements and supervision levels. The different programs have requirements which reflect the needs of the individual defendant. The requirements can include supervision, treatment, classes, restitution, or CSR. Some of the options involve the payment of program fees or tuition fees for classes. However, the inability of a defendant to pay these fees will not disqualify them from PTD nor will non-payment be a reason for unsuccessful discharge from the program.

What are the different diversion options?

There are three diversion tracks available.

1) Specialty courts

This track includes our current specialty courts including Mental Health Court, DWI Court, Veterans Court, Drug Court, and the Youthful Offender Program

2) TCDA supervised PTD

Cases in this track are monitored internally for a fixed period of time, typically 3 to 6 months. Defendants may be required to take a class and/or pay restitution. Once they complete the program, the case is dismissed.

3) Probation supervised PTD

This track requires defendants to report regularly to a probation officer and pay a \$60/month supervision fee. The defendant may be required to complete 1 or more classes, participate in substance abuse treatment, pay restitution, or complete other requirements. The program is for up to one year depending on the classes or other requirements to be completed.

What cases are eligible for pretrial diversion?

Technically, any case can be considered for pretrial diversion. Certain cases are “presumptively eligible” for diversion. These include most drug possession cases and property crimes. Going forward, presumptive diversion cases will be sent for diversion review automatically. Any of those that are determined to be inappropriate for diversion will be returned to the original court for traditional prosecution. For cases that are not automatically reviewed, the assigned prosecutor or the defense attorney can submit the case to be considered.

What about if the defendant is in jail?

If the defendant is in custody, the assigned prosecutor should work on a bond with the defense attorney. If the offense is presumptively eligible for diversion, the case should be referred for diversion review. If the offense is not presumptively eligible but the assigned prosecutor believes the case is otherwise appropriate, the case should be referred for consideration. An out-of-county hold or a parole hold does not disqualify a defendant from consideration.

What about if the case has a victim?

If the assigned prosecutor wants to refer a case where there is a victim, **the prosecutor should contact the victim before making the referral**. This includes property crimes as well as violent ones. The victim's view should be considered but is not dispositive. The victim should be asked if there were any out-of-pocket costs that should be included as restitution. The contact should be documented in the work product notes. If restitution is requested, the victim's mailing address and contact information should be confirmed or updated in TSP.

How does the defense attorney request a PTD review?

There is no longer a written application form. Defense attorneys can submit a request for review by going to the TCDA web site.

What about if I don't think it's a diversion case but the defense attorney wants to apply?

The defense attorney can submit a request through the TCDA web site where they can explain why the case should be considered for PTD. The prosecutor should enter a work product note explaining why PTD is not appropriate.

What if a case is rejected for PTD?

The case will be returned to the assigned prosecutor for normal prosecution. A "Rejected for PTD" tag will be added to the file. If a case has been rejected, but the assigned prosecutor learns new information that could impact the PTD decision, the prosecutor should put that information into a work product note and resubmit the case by changing the status to "Diversion Review".

Special Violence Unit, Family Violence, and Youth Justice

Director approval is required whether it is an ADA or defense request for diversion on cases handled by these units.

NOTE: The below flowcharts are to be used as a guide to help an ADA consider factors to use for their own prosecutorial discretion.

BAIL FLOW CHART

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Is the person charged with a State Jail Felony?



Presumption is release w/ no conditions (\$1 or PR Bond).

Is the person charged with any other Felony?



Presumption is release with the least restrictive condition.

Evaluating Exceptions to the Presumptions. Remember, Art. 17.15, Art. 1, Section 13 of Texas Constitution, and Due Process Clause of Fed'l Constitution apply. We should be considering O'Donnell and Daves for guidance.

FLIGHT RISK: Are there more than two failures to appear w/in the last two years and information that shows that the failures to appear were an effort to avoid prosecution, such as evading the police upon request on the warrant or using an alias upon a police encounter that was used to evade prosecution. Alias means more than a misspelling of a name, the use of maternal or paternal last name, or the use of a nickname.



DANGER TO THE COMMUNITY: Is the person charged with a violent crime, and are there are allegations of prior acts of violence near in time OR articulable facts and circumstances to indicate the accused is at risk for future dangerousness. This may include verbal or non-verbal threats directed to the victim close in time to the arrest. The offense alone should not **normally** be used to determine dangerousness.



If NO to both, presumptive rules apply.

If YES to flight risk or community safety, is there a condition available that would ensure return to court or safety OTHER than unaffordable bail/preventative detention?

NOTES:

This flowchart applies to magistration, defense requests for bond AND all ADAs should review open files and new cases assigned to determine whether or not this policy applies.

If a person is IN custody on money bail for longer than 72 hours, then there is a presumption that it is "unaffordable bail" which is effectively preventative detention. The Statute only allows for "no bond"/actual preventative detention in two situations (Art. 17.152/153).

If a person has been on EM or GPS for a period of time without violations, defense motions to reduce /lessen the condition should be considered.

If a person should be released under this policy but has a hold, efforts should be undertaken to see if the hold can be lifted or resolved.

CHARGING FLOW CHART

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1. Can we prove the case beyond a reasonable doubt at trial on the top charge or is there a compelling policy reason to let the community decide if the case should move forward?
2. Are necessary victims and witnesses cooperative? If no, can the case be made out without them at trial?

NO

Do not present to the Grand Jury. If deficiencies cannot be remedied within 90 days, consent to release and/or dismissal. TX CCP Art. 17.151 (1)

YES

Enhancements. Does defendant have a prior felony or misdemeanor conviction that can be used to enhance the penalty for the current charge?

NO

Present as Planned.

YES

Penalty. Is there an articulable public safety reason to enhance the charge such as a nexus between the prior conviction and current case? Is there Director Approval for enhancing?

NO

Proceed without the penalty enhancement.

YES

Proceed with the enhancement.

Misdemeanor Enhancements. Is there a clear nexus between the misdemeanor and current charge, in both time and facts, that would indicate there is a risk to public safety? See § 31.03, 38.04, 43.02.

NO

Proceed without the enhancement.

YES

Proceed with the enhancement.

Capital Murder. Do the facts of the underlying case support a capital murder charge?

NO

Present as a murder case.

YES

Present as capital murder after a panel of the Division Director, First Assistant, and District Attorney have agreed that capital murder is appropriate. Factors to be considered include: the facts of the case, defendant's prior record, aggravating circumstances, mitigating information, and age of the defendant.

1. Readiness: If, efforts to contact necessary witnesses have failed, or the witness refuses to cooperate and charges cannot be proven without the witness, defense counsel must be notified after 30 days.
2. If after six months, and reasonable efforts to contact necessary witnesses have failed and/or to gain cooperation have failed, the case should be dismissed –witness not available.
3. Due to the pandemic, for open cases prosecutors should consider the last six months from today's date as the time period. Moving forward, it is six months from arrest.
4. **EXCEPTIONS:** Please conference with your director if a necessary witness is uncooperative or efforts to contact the necessary witness have failed, but you believe circumstances will change.

NARCOTICS CASES

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Ojngekgghjrkaqm or less, possession or sale:
Is there an articulable threat to public
safety that would justify charging the POCS
and has the Director of Policy signed off?

NO

Reject the charges.

YES

For any narcotics case, regardless of
weight or circumstances or prior record,
has the case been considered for
diversion?

NO

Send all narcotics cases for diversion review, regardless of prior
record, holds, or custody status.

YES

CHARGING OF NARCOTICS CASE: Threshold Weights. Goal is ensuring that heavy user or mules not charged with first degree felony. Note: Director permission is required to indict first-degree narcotics cases.

Circumstances that warrant a first-degree charge include:

1. The individual possess controlled substances over the necessary quantity threshold; and
2. Given the specific substance recovered, the quantity possessed or sold is inconsistent with personal use or street-level dealing; and
3. There are additional facts demonstrating that the individual apprehended is a high-level distributor of controlled substances (such as evidence he or she managed distribution performed by others; coordinated efforts of many participants; or made judgement calls about business operations, strategy and methods).

Charging of Narcotics Cases: Possession with Intent to Deliver Controlled Substance. Goal to ensure that sellers, and not "go-betweens" are charged appropriately.

Circumstances that warrant sale charge:

1. Evidence of an actual or attempted sale not for personal use (ie buying two, selling one and using one);
2. Two or more indicators of distribution such as large amounts of cash, scales, ledgers, etc.

Sentencing. Presumption that, regardless of prior record, that non-incarcerative sentence is appropriate for all narcotics cases. If Diversion is not appropriate, the presumptive term of supervision for either a deferred adjudication or probation should be two years. Director approval required for incarceration offer on a drug offense (even first degrees).

Diversion Consideration.

1. No serious bodily injury to victim. Refer for diversion consideration regardless of prior record.
2. Family violence, sexual assault and child abuse cases, refer as needed for diversion.
3. Victim suffered SBI. Case may still be diversion appropriate if it is sufficient to address safety concerns, however, serious mitigating factors must exist (victim wants diversion, defendant suffers from mental health disorder that was untreated and now in treatment, etc.).

Is the charge a drug or victimless offense?

YES

Presumption is non-incarceration. Period of supervision should not be longer than necessary to achieve the goal of supervision (generally two years).

Is the victim a family member or known well to the defendant?

YES

Consider their thoughts on sentencing and what is likely cause the least amount of harm or trauma. We do not know better than the person who has been hurt by a loved one what is best for them. We must listen to victims and hear what they need to help them on the path towards healing. We have the ability to be creative and responsive to their needs, if we listen and think outside the box. Child victims should not bear the responsibility of making a decision about a loved one, however, ADAs should make every effort to determine which outcome is the least traumatizing and will keep the community safe.

Is the defendant a stranger to the victim?

YES

While it is important that we listen to victims' requests with regard to sentencing and understand their reasoning, it is also important that we set realistic expectations. We should also consider and discuss with victims steps that can be taken to ensure victims feel safe, or could be made whole again in or out of the criminal justice system (such as offender-victim mediation, restorative justice referrals, restitution, testifying at sentencing, etc.).

Does the defendant have a mental health or substance abuse disorder?

YES

Substance abuse and mental health disorders should never serve as a justification for imprisonment. This must be true in the context of both initial case resolutions and any recommendations this office makes as to violations of bond conditions or probation violations.

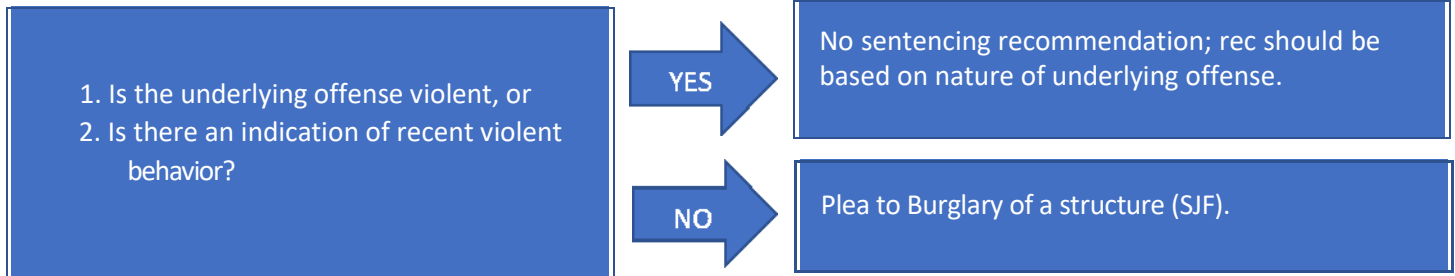
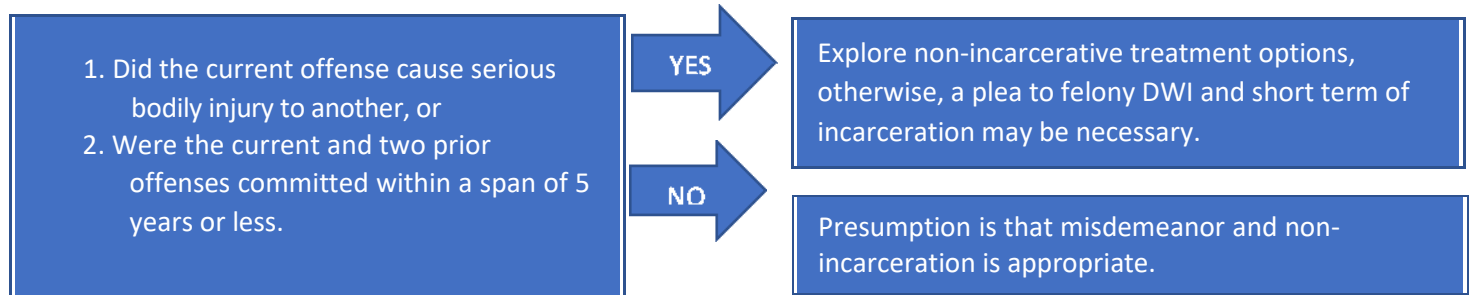
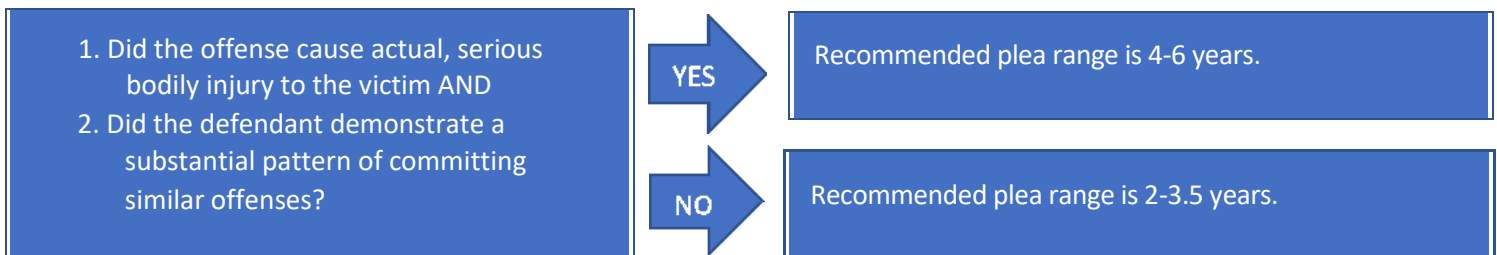
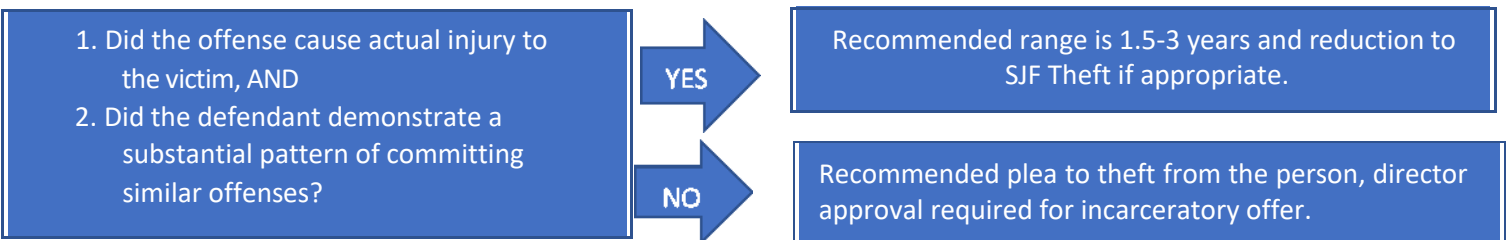
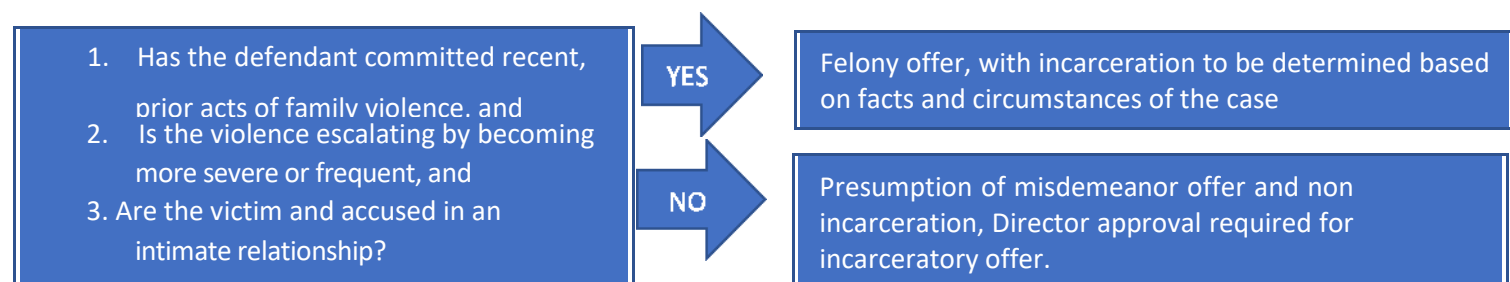
If considering incarceration, is there a legitimate public safety reason to show that incarceration is the only way to keep us safe?

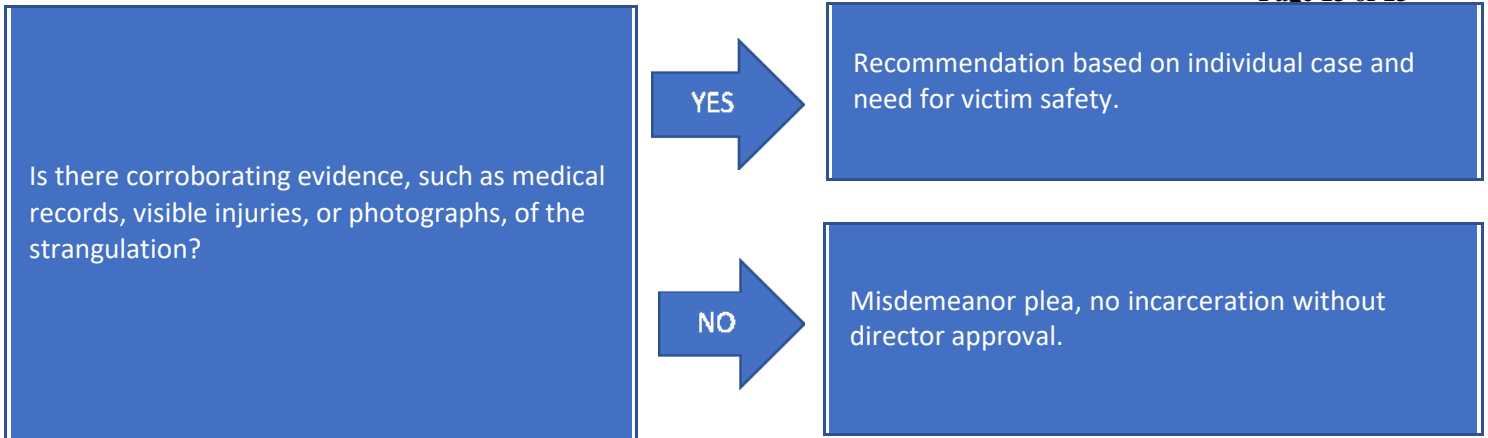
YES

Refer to sentencing recommendations. For any case where incarceration is offered, there must be a legitimate safety concern that will be met by incarceration that cannot be met through community supervision. All non-incarcerative options must first be considered.

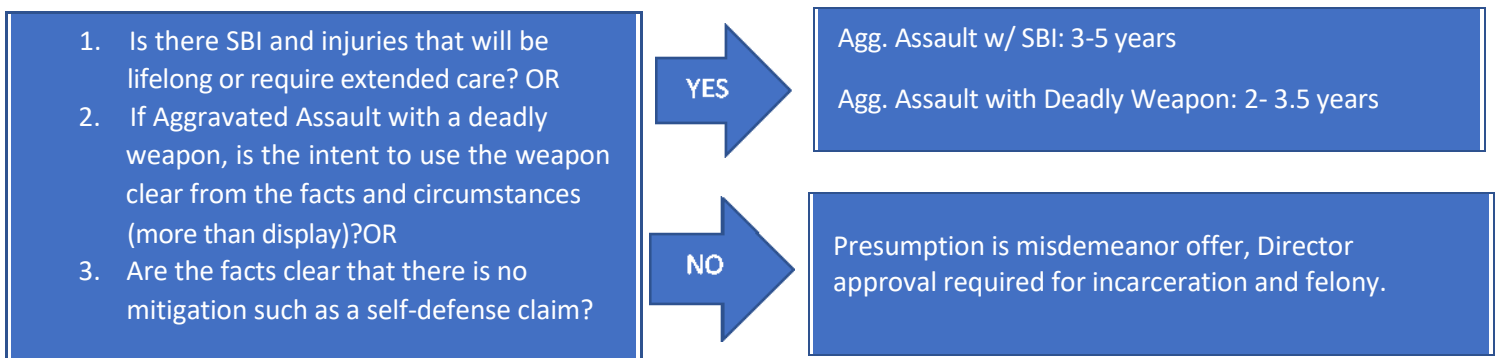
Any sentence over 20 years must have approval from Director and First Assistant or District Attorney.

STOP: These recommendations are only to be considered AFTER diversion and all non-incarceratory options have been explored. Incarceration will be justified for community safety.

Burglary**DWI, 3rd and subsequent offense****Aggravated Robbery****Robbery****Assault on a Family/Household Member with Previous Conviction**



Aggravated Assault



All other cases where diversion or community supervision will not ensure community safety

